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FAQs on COVID-19 as Force Majeure event in contracts law

Is Force Majeure expressly regulated by Italian contracts law?

No. Italian contracts law does not expressly regulate the Force Majeure.

Italian Civil Code in respect of contracts just provides that if some circumstances arise (which, according to law cases, must be (i) objectively extraordinary and unforeseeable when the contract was entered into, (ii) not attributable to, or caused by, the debtor and (iii) irremediable), which render the debtor's performance:

- (a) **definitively** (or **temporarily**) **impossible**; or
- (b) **totally** (or **partially**) **impossible**; or
- (c) (only in respect of contracts to be continuously or periodically performed) **excessively onerous**,

then some remedies are granted to the contract parties.

Therefore, Force Majeure (as conceived by international trade) – although not expressly regulated by Italian contracts law – under Italian law has been progressively equated, due to its nature, to a circumstance rendering debtor's obligation either definitively (or temporarily) or totally (or partially) impossible, or excessively onerous.

Does COVID-19 qualify as a Force Majeure event (rendering debtor's obligation in any way impossible or excessively onerous)?

In our opinion, yes.

This is because COVID-19 (as Italy is currently experiencing it) usually meets all the requirements provided by Italian contracts law to render a debtor's obligation either definitively (or temporarily) or totally (or partially) impossible, or excessively onerous.

Namely, COVID-19: (i) was extraordinary and unforeseeable when the agreement was entered into; (ii) is not attributable to, or caused by, the debtor; and (iii) is irremediable.

However, should COVID-19 be remedied (which means that a debtor can fulfil its obligation – taking into account all the circumstances actually existing when the fulfilment is due) – then COVID-19 does not qualify as a Force Majeure event (rendering debtor's obligation either definitively (or temporarily) or totally (or partially) impossible, or excessively onerous).



Which are the remedies provided by Italian contracts law upon the occurrence of a Force Majeure event (rendering debtor's obligation in any way impossible or excessively onerous)?

Italian contracts law grants the contract parties with several remedies.

In particular, in respect of any kind of contracts:

- (a) if the debtor's performance becomes definitively impossible, the **contract terminates** by operation of law; and
- (b) if the debtor's performance becomes temporarily impossible, the **contract terminates** by operation of law (if the performance can not be longer claimed by the creditor or is no longer of the creditor's interest).

In respect of contracts with mutual performances:

- (a) if the debtor's performance becomes totally impossible, **contract terminates** by operation of law and the creditor is only entitled to claim the **return of the performance** already fulfilled; and
- (b) if the debtor's performance becomes partially impossible, the creditor is entitled to either (i) claim a **reduction of its performance** or (ii) **withdraw from the contract** (if the same creditor has no interest in a partial performance).

In respect of contracts to be continuously or periodically performed (or the performance of which is deferred), if debtor's performance becomes excessively onerous, the debtor is entitled to claim the **termination of the contract** (provided that the excessive onerousness did not originally fall within the contractual risk), but the creditor may avoid termination by offering to **fairly amend the contract** terms and conditions.

How is COVID-19 affecting contracts currently in force?

COVID-19 is materially affecting several types of agreements, including:

- (a) M&A contracts, where COVID-19 is currently invoked on the side of the buyers as either a **MAC** (*Material Adverse Change*) or a **MAE** (*Material Adverse Effect*), so to re-open negotiations about already agreed points (especially price); and
- (b) commercial (and personal) lease agreements, where COVID-19 is currently invoked on the side of the tenants in order to either:
 - (i) **postpone the payment of the rent** due to the tenant's temporary impossibility to pay the rent (pursuant to Article 1256 of the Italian Civil Code); or
 - (ii) **withdraw from the contract** due to serious reasons (pursuant to Article 27, last paragraph, Law No. 392/1978); or
 - (iii) **terminate the contract** due to a supervening excessive onerousness and/or having the relevant terms and conditions fairly amended (pursuant to Article 1467 of the Italian Civil Code).

How is Covid-19 affecting contracts currently under negotiations?

The current trend is to include in contracts a clause by which the parties – after expressly acknowledging COVID-19 as a Force Majeure event – undertake to **re-negotiate** the **contract**



in good faith should the health emergency last in either the middle or long term.

What do we suggest the contractual parties to do to manage COVID-19?

If the contract parties wish to keep the contract in place, we suggest them to adopt a **softer approach** by firstly acknowledging the outbreak of COVID-19 as a Force Majeure event and then **re-negotiating** and amending their contract provisions.

However, both the creditor and the debtor may adopt **tougher approaches** by avoid fulfilling their obligation under the contract, claiming the **contract termination** or the reduction of their performance, rather than **withdrawing from the contract**.

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